IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3988 of 1999

with
CIVIL APPLICAITONS NOS. 14229, 12837 AND 10346 OF 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

Saurashtra Kutch Pole Industries Association
Versus
GUJARAT ELECTRICITY BOARD

Appearance:
1. Special Civil Application No. 3988 of 1999
MR TUSHAR MEHTA for Petitioners
MR MD PANDYA for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2
MR PS CHAMPANERI for Respondent No. 3, 7
MR PARESH M DAVE for Respondent No. 4
MR YN RAVANI for Respondent No. 6

CORAM : MR.JUSTICE C.K.THAKKAR

Date of decision: /05/2000

CAV JUDGEMENT

This petition is filed by the petitioners for a writ of mandamus or any other appropriate writ, order or direction quashing and setting aside the decision of the Gujarat Electricity Board (`Board' for short) respondent No.1 herein, of purchasing readymade PSC poles from respondent Nos. 3 to 7.

Originally, the petition was filed by (1) Bhanjibhai N Bhadresha (2) M/s Universal Distribution, proprietary firm and (3) M/s Mahavir Construction Company, a partnership firm . It was instituted on 3rd June, 1999 i.e. during summer vacation. The said petition came for hearing before the learned Vacation Judge on the next day i.e. 4th June, 1999. It appears that on that day, draft amendment was submitted by learned counsel for the petitioners seeking two amendments. Firstly, the petitioners sought to amend the cause title by changing petitioner No.1 from Bhanjibhai N. Bhadresha to Saurashtra Kutch Pole Industries Association through its President Bhanjibhai N Bhadresha having its office near Railway Station, Dhoraji and also cause title of respondent No.1. Secondly, after para 12, para 12A was sought to be added . The draft amendment was granted by the learned Vacation Judge. I will deal with the amendment and contentions raised in connection with the said amendment at an appropriate stage.

The case of the petitioners as stated in the petition is that the first petitioner is a voluntary association dealing with pole industry supplying poles to the respondent-Board in Saurashtra and Kutch area. Second and third petitioners are traders in poles. The petitioners have challenged the action of the respondent-Board of purchasing about 2,76,000 poles of a total price of Rs. 25 crores from respondents Nos. 3 to 7. Said action is arbitrary, illegal, unjust and unreasonable. It was also stated that over and above the said decision, commitment was made by the respondent Board to purchase half of the quantity of poles from respondents Nos. 3 to 7 at additional cost of Rs. 15 crores. It was alleged that the Board had decided to purchase poles at the rate of Rs. 909/- per pole from respondent No.3 and at the rate of Rs. 950/- per pole from respondents Nos.4 to 7. According to the petitioners, the said price is exorbitant and excessively high. Had tenders been invited, the Board could have obtained poles at a very low price. But only with a view to favour respondents Nos. 3 to 7, the action was taken

to award contract to them by private negotiation which had caused serious prejudice to public exchequer. No procedure was followed of inviting tenders nor all persons similarly situated dealing in pole industry were offered an opportunity before taking the decision in favour of respondents Nos. 3 to 7. Earnest money / security deposits were not taken from respondents Nos. 3 to 7. The decision was taken on the ground of so-called emergency, need and necessity under the excuse of account of cyclone in Saurashtra and Kutch area in June, 1998. But it was clearly ruse and there was no such need or emergency which is clear from the material on record as also from the fact that poles were not supplied by respondents Nos. 3 to 7 on the basis of emergency. It was stated that when the second petitioner came to know that the Board was contemplating to purchase poles without inviting tenders from respondents Nos. 3 to 7, a representation was made on 15th October, 1998 to the Chief Engineer (Material) who informed the second petitioner to contact him on November 10, 1998. But the letter was received by petitioner No.2 only on 11th November, 1998 i.e. a day after the date on which he was called for discussion. It was also stated that petitioner No.2 received another letter dated 7th November , 1998 by which he was asked to fill in the tender in pursuance of Public notice dated 2nd November, 1998. According to the petitioners , in view of issuance of tender, they were of the opinion that bids will be invited from all interested persons and a decision will be taken on the basis of tenders submitted. Unfortunately, however, on or about 12th/ 13th November, 1998, petitioner No.1 came to know that the Board had placed orders for purchase of ready-made PSC poles to respondents Nos. 3 to 7 of large quantity at an excessive price though last date of submission of tenders was November 24, 1998 as per the advertisement, dated 2nd September, 1998 (Annexure `B' to the petition). It was stated in the petition that apart from petitioner No.2, other persons had also made applications to the Board showing their willingness to undertake supply of ready-made/ fabricated PSC poles on emergency basis to the respondent-Board. They were Bhanjiabhai Bhadresha (President of the Association), nominee of M/s Maruti Pole Industries, Sandeep B. Bhadresha ,proprietor of Bhadresha Pole Industries, etc. It was also stated that 36 persons filled in tenders for supply of poles to the respondent Board. The lowest price quoted per pole was Rs. 781/- per pole (Rajasthan) and Rs. 896/- per pole (Gujarat). In these circumstances, the action taken by the Board in ignoring tenders and giving contract to respondents Nos. 3 to 7 clandestinely causing

substantial loss to public exchequer was arbitrary and unreasonable. Petitioners have also stated that a representation was made by the Association on 15th February, 1999 before the Chairman of the Board, copies of which were also sent to Honourable the Chief Minister, Honourable the Energy Minister, Honourable the Finance Minister and others. Petitioner No.1 waited for one month and thereafter on 15th March, 1999, met the Chairman of the board . A fresh memorandum was submitted on that day and thereafter, again two representations were made on 24th May, 1999, but nothing was done by the respondent Board. Existing factories were not given orders by the Board which was also illegal as they manufacture/ fabricate poles which can be used only by the Board. Non-purchase of poles by the respondent Board from them would result in serious financial crisis to such manufacturers / producers. As the action was clearly illegal, arbitrary and unreasonable, the petitioners were constrained to approach this Court by filing the petition.

On 4th June, 1999, the petition was placed for admission before the learned Vacation Judge . It may be stated at this stage that a petition being SCA No.1924 of 1999 was filed by Somnath Pole Industry on 16th March, 1999 making almost a similar grievance and praying similar and other additional reliefs. In that petition, respondent Nos 1 to 7 in the present petition were also made respondents . There also, the grievance of the petitioner was that the action of the respondent Board in giving contract to respondent Nos. 3 to 7 was illegal, arbitrary, unreasonable and contrary to law. Certain prayers were sought in para 6 of the petition. It is necessary to reproduce that para as on the basis of prayers made in that matter, arguments were advanced on behalf of the respondents that petitioners of both the petitions wanted undue benefits in their favour. Para 6 read as under :

"6. For the reasons stated hereinabove and those which may be urged art the time of hearing,. the petitioner prays that this Honourable court may be pleased to-

(a) a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted quashing and setting aside the work orders given to respondents Nos.3 to 7 for readymade poles;

(b) a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted directing the respondent Nos.1 and 2, their agents and servants to place with the petitioner the order for sufficient number of quantities for fabrication of poles at the approved rates prevailing in Porbandar circle and for manufacturing readymade poles at the rate of Rs. 949 per pole as offered in the tender submitted on 7th December 1998;

(c) pending admission hearing and final disposal of this petition an interim injunction may kindly be granted restraining the respondents, their agents and/or servants from implementing the work orders for manufacturing of the readymade poles given to respondent Nos.3 to 7 as per the details given in para 2.12 of the petition.

(d) pending admission and final hearing of this petition, an interim direction may kindly be given directing the lst and 2nd respondents to place the orders for fabrication of poles or manufacturing of readymade poles with the existing factories from which the first and second respondents had purchased fabricated poles or readymade poles prior to 2.11.1998."

That petition (SCA No. 1924 of 1999) came up for hearing before the learned Single Judge on 28th April, 1999. Notice was issued which was made returnable on 11th May, 1999. On the returnable day, Mr. Chamapaneri appeared on behalf of respondent Nos. 3,5 and 7 and as observed in the order, he sought time to file Vakilatnama for those respondents and sought time to file counter affidavit . Time was granted and the matter was adjourned to 23rd June, 1999. Liberty was, however, reserved to the petitioners to move learned Vacation Judge in case of urgency. No interim relief was, however, granted by the Court.

It may be stated that the present petition was filed on 3rd June, 1999 by Bhanjibhai Bhadresha and others. It was solemnly affirmed on the previous day i.e. on 2nd June, 1999 by Bhanjibhai,petitioner No.1, (as at that time). It was not stated in the present petition that any other petition was filed. No doubt, para 15 of the present petition reads as under:

"15. The petitioners submit that they have not filed any other application or appeal either before this Honourable court or before any other courts in India including the Honourable Supreme Court of India with regard to the subject matter of this petition."

It is, however, pertinent to note that when the petition was taken up for hearing on June 4, 1999,(petition was filed on 3rd June, 1999), draft amendment was submitted by getting para 12A inserted which read as under:

"12A. The petitioners state and submit that one shree Somnath Pole Industries which is a member of petitioner No.1 association has filed Special Civil Application No.1924 of 1999 before this Honourable court challenging the work order given to the parties which are favoured by respondent Nos.1 and 2. It is submitted that the said petition pertains to the personal interest of the said petitioner in which it is prayed by the petitioner, inter alia, that the respondent Nos.1 and 2 herein be directed to place the order for sufficient number of poles at the rate of Rs. 949/- per pole. It is submitted that the present petition challenges the very action of the respondents in seeking to distribute the government largess in the most arbitrary manner solely on the basis of favouritism and extraneous considerations which are manifestly demonstrated by perusing the way in which the respondents have acted in collusion with one another for selfish gain at the cost of public money. In the said petition, this Honourable court (coram: D. C. Srivastav, J.) is already pleased to issue notice to the respondents therein and the said petition is pending for adjudication before this Honourable court."

Learned Vacation Judge issued notice and granted interim relief. The order read as under :

"When the matter was called out, learned Senior

counsel Mr. Vakharia with Mr. Tushar Mehta is present and he presented a draft amendment. Leave to amend as per the draft amendment. Mr. Vakharia makes a statement that respondent Nos.3 to 7 have not started supplying PSC poles to the first respondent till today as per the works order given to them by respondent No.1. Therefore, if ad-interim relief or status quo with respect to supply of the PSC poles is granted, no prejudice is going to cause to the respondents.

Notice returnable on 1.7.1999. Till then, ad-interim relief in terms of para 17 (b) is granted. D. S. permitted."

The said relief was continued from time to time.

I have heard Mr. K.G.Vakharia instructed by Mr. Tushar Mehta for the petitioners , Mr. M.D.Pandya for respondents Nos. 1 and 2, Mr. B.P.Tanna, senior advocate instructed by Mr. P.S.Champaneri for respondent No.3, Mr. Paresh Dave for respondent No.4, Mr. Y. N.Ravani for respondents No.6 and Mr. P.S.Champaneri for respondents Nos. 5 and 7.

Mr. Vakharia for the petitioners raised several contentions. He submitted that it is well settled principle of law that whenever a public authority is taking any action either of sale or purchase on a large scale, it is obligatory on the part of instrumentality of State to invite tenders and to award contract on the basis of comparative bids. It is a rule which ought to have been followed in the instant case also. As tenders are not invited and comparative bids are not considered, the impugned action must be held to be illegal, arbitrary and contrary to law. In the case on hand, according to the learned counsel, purchase was substantial and amount of several lacs of rupees was to be paid. Moreover, initially, legal action was taken and tenders were invited. Suddenly and abruptly, however, the said course was given up and with a view to favour respondent Nos. 3 to 7, contract was awarded which deserves to be quashed. He also submitted that petitioner No.1 Association was not taken in confidence. All the tenderers who had submitted their bids were not called for discussion and negotiation. Their say in the matter was ignored. So much so that some persons were asked to remain present on a particular date but the letter had reached them after

the said date had gone (for instance, petitioner No.2).

Mr. Vakharia also contended that in the concerted process, minimum figures of Rs. 781/- and 896/- per pole were totally ignored by the Board and contract was given to four respondents at the rate of Rs. 950/- per pole and to one respondent at the rate of Rs. 909/-. There is no earthly reason why instead of Rs. 781/- or Rs. 896/- per pole, the Board had decided to purchase per pole for Rs. 909/- and for Rs 950/-. Again, there is no apparent reason or ground to distinguish case of respondent No.3 who will supply poles at the rate of Rs. 909/- per pole and respondents Nos. 4 to 7 who will supply similar poles at the rate of Rs. 950/-. Considering even that difference, the Board has caused loss of lacs of rupees to public exchequer.

The learned counsel for the petitioners also stated that the petitioners were and are ready and willing to supply readymade PSC poles at the rate of Rs. 896/- per pole and the action of the respondent Board is thus arbitrary, unreasonable and causing substantial loss to the Board. Learned counsel made a grievance that as the respondent Board wanted to favour respondent Nos. 3 to 7, usual procedure was given go-bye and security deposit which was a condition precedent before award of contract was not insisted upon from them. He also made a complaint that in an action to benefit respondent Nos. 3 to 7, the Board has acted to the detriment of several members of petitioner No.1 Association who are dealing in/ manufacturing/ fabricating PSC poles and who have set up their factories only to supply poles to GEB Board. If the action of the first respondent Board is upheld, some of them will be seriously affected and they might have to wind up their business.

The petitioners did their best before approaching this Court to convince the officers of the Board as well as executives at the highest level . They have also moved the highest authority of the Government. But as nothing was done by them, they were constrained to approach this Court.

Mr. Pandya for the Board, on the other hand, supported the action of the Board. He submitted that before dealing with and deciding the contentions raised by the petitioners in this petition, this Court may keep in mind the most material and vital fact that the present litigation is not in the nature of Pro bono Publico but by "rivals in trade". He contended that petitioner No.1 is not a recognised Association. That apart, it is

really Bhanjibhai Naranbhai Bhadresha (who has been referred to as one of the petitioners by the Board in the affidavit in reply) who wanted to continue supply of electricity poles to the Board by maintaining his monopoly and with a view to achieve that oblique motive, the present petition has been filed by him. There is no public element in it. Moreover, there is gross delay and laches on the part of the part of the petitioners in approaching this Court inasmuch as the decision was taken by the Board to award contract to respondent Nos. 3 to 7 in November 1998 and that fact was known to the petitioners in February, 1999 and yet, they waited upto June, 1999. Mr. Pandya also contended that there is no statutory obligation on the Board to invite tenders before taking action of purchase of PSC poles. There are several modes of entering contracts with suppliers of PSC poles and when one of such modes was adopted by the Board, no objection can be raised against it. The counsel submitted that the action was taken in larger interest of common public and considering extraordinary situation and emergency in certain parts of the State. Relying on the affidavit in reply filed by the Chief Engineer (Material) and Annexures to the said reply as also further affidavit, it was contended that the petitioners have no right to make any grievance and the petition is liable to be dismissed.

Respondent Nos. 3 to 7 have also supported Mr. Pandya on all those points. Mr. Tanna , senior advocate for Mr. Champaneri for respondent No.3 highlighted certain circumstances and contended that the petitioners have not approached this Court bona fide with clean hands. There is mala fide intention and oblique motive on their part inasmuch as , Bhanjibhai Naranbhai Bhadresha who is connected with several factories/ industries/ units wanted that no outsider should enter the field if such person is not associated with his factories/ industris/ units. Such outsider must be ousted as early as possible and should not be allowed to compete with him.The counsel also submitted that by obtaining ad-interim relief from 4th June, 1999, the petitioners have caused substantial loss not only to the respondent-Board but also to respondent No. 3,5 and 7, who have acted to their detriment . He stated that after the contract was given to respondent No.3, he invested huge amount and made readymade poles . But as interim relief was granted by the Court, poles could not be supplied and the respondents have sustained loss of lacs of rupees. Hence, Civil Application No. 12837 of 1999 is filed by respondent Nos. 3,5 and 7. Similar application is also filed by respondent No.4 being CA No. 10346 of 1999.

Applicants of both Civil Applications have prayed to issue appropriate direction ordering the petitioners to pay damanges/ compensation due to loss caused to them and also to pay exemplary costs. M/s Parsh Dave and Y. N.Ravani supported Mr. Tanna.

Having heard the learned advocates for the parties, in my opinion, no case has been made out by the petitioners to exercise extraordinary jurisdiction of this Court under Article 226 of the Constitution in their favour.

In my opinion, Mr. Pandya is right when he submitted that the present petition is not in the nature of Pro bono Publico. I do not wish to state that a vigilant citizen or public spirited organization, keeping in mind larger public good and worrying for public exchequer has no right to approach this Court by inviting attention of the Court against illegality being committed by an instrumentality or agency of the State. And the Court may not dismiss such petition only on the ground that it is not maintainable. Hence, even if it is conceded that petition is filed not by Bhanjibhai Naranbhai Bhadresha and others in their individual capacity (as it was originally filed) but by Bhanjibhai Naranbhai Bhadresha and others as Association and its members, a relevant fact that it is instituted by members of an Association who are "rivals" in the trade with respondent Nos. 3 to 7 and others cannot be ignored. It is not that the Court will not consider the points raised by the petitioners or arguments advanced by their counsel at the time of hearing of the petition . But the court is expected to consider the questions and decide them keeping in mind the parties before it.

It was also the grievance of the respondents particularly respondent Nos.3 to 7 that present petition is an abuse of process of Court as in the previous petition viz. SCA No.1924 of 1999, no interim relief was granted by this Court. It was also contended by them that both the petitions viz. SCA No.1924 of 1999 and 3988 of 1999 were filed by one and the same office (SCA No.1924 of 1999 was filed through advocate Mr Mehul Vakharia and present petition SCA No.3988 of 1999 was filed through advocate Mr. Tushar Mehta) but the fact regarding filing and pendency of the previous petition was nowhere mentioned in the subsequent petition. It was further submitted that interim relief prayed in clause (D) of para 6 of SCA No. 1924 of 1999 was also significant , in that, pending admission and final disposal of the petition, interim direction was sought by the petitioners that the respondent Board should be directed to "place orders for

fabrication of poles with the existing factories from which the first and the second respondent had purchased fabricated poles or readymade poles prior to 2.11.1998".

Regarding suppression of fact and filing of second petition, Mr. Vakharia submitted that when two advocates are different , it is quite possible that filing of a petition by one may not be known by the other. He also stated that if intention on the part of the petitioners was to suppress the fact of filing of a previous petition (SCA No.1924 of 1999), draft amendment on the first day of the hearing before the learned Vacation Judge would not have been moved. According to the counsel, the previous petition was not filed on behalf of the Association but in an individual capacity and as soon as the Association came to know of that petition, on the first date itself, amendment was sought and it was granted by the Court.

In the facts and circumstances, I am of the opinion that it is not proper to dismiss the petition on the ground of suppression of facts. It cannot be said that what the petitioners have stated is false or incorrect. Again, as the learned counsel for the petitioners stated, on the first date of hearing itself, when even notice was not issued, draft amendment was moved wherein the fact regarding filing of earlier petition (SCA No.1924 of 1999) was brought to the notice of the Court. But there is substance in the second part of the contention of the respondents regarding interest of Bhanjiabhai Bhadresha and interim relief sought in earlier petition. I will deal with it appropriate stage while considering the contentions of the Board in the light of the affidavit in reply . There is also considerable force in the argument of the respondents about delay and laches on the part of the petitioners . As is clear, the decision was taken to award contract to respondent Nos. 3 to 7 in November 1998. Even according to the petitioners, they came to know about the fact of awarding of contract to respondent Nos. 3 to 7 in February, 1999. The present petition was filed in June, 1999. It may be appreciated that when the fact regarding SCA No.1924 of 1999 (filed in March,1999) was not within the knowledge of the petitioners (as the said fact was not reflected in the petition originally drafted and was placed on record only on 4th June, 1999 by inserting para 12A), there was considerable delay opn the part of the petitioners in moving this Court. Looking to the affidavits of the Board as well as contesting respondents, it is clear that much water had flown and huge investment was made by the contesting respondents. They are,therefore, right in contending

that serious prejudice has been caused to them and they have suffered. In the facts and circumstances of the case, however, when several points were raised in the petition, it would not be proper to dismiss the petition only on the ground of delay and laches and it would be appropriate to deal with contentions raised by the respective parties. Hence, I proceed to consider the matter on merits.

Now, regarding contract for supply of readymade PSC poles, affidavits are filed by Mr. C.M.Dalal, Chief Engineer (Materials). It was inter alia stated that there being no statutory or legal obligation to enter into such contract only by inviting public tenders, the action taken by the Board cannot be said to be contrary to law. It was further stated that due to cyclone in Saurasthra and Kutch region in June, 1998, which had damaged/ destroyed several PSC poles, request were made by various parties for suply of readymade poles as well as for taking job works. Demands for PSC poles were increasing because of (i) regular requirement of poles per year; (ii) damage/ destruction of poles because of heavy cyclone and (iii) Tatkal scheme declared by the Government of Gujarat. It was,threfore, decided to finalise applications on hand for supply of readymade poles on urgent basis as invitation of tenders and finalisation thereof would take long time. Accordingly, it was decided to consider 13 applications for supply of readymade PSC poles , they were placed before the Board meeting and vide a resolution,dated 3rd November, 1998, it was decided to place orders to respondent Nos.3 to 7 afrter negotiations and finalising rates of Rs. 909/and 950/- per pole. It was disclosed that Bhanjibhai Bhadresha,who is partner of N.H. Moradia and company had also got an order with approval under Board resolution dated May 26, 1998 at a higher rate of Rs. 1000/- per pole plus taxes. It was stated that in view of requirement of poles for several reasons, the Board took certain steps as stated in para 5.4 of the affidavit.

They were as under:

(a) To transport all the poles available in the Board's Pole factory situated in various districts to cyclone affected area.

(b) To request all the existing pole factories to increase the production and a meeting was arranged but they had asked for increase of

rates.

(c) To purchase poles from adjacent States i.e. Maharashtra, Madhya Pradesh and Rajasthan.

(d) To convert the existing job work contract into ready made contract as per request of t he party (based as the rates finalised earlier @ Rs. 950/- per pole plus taxes.

(e) To finalise the applications received long back from the Gujarat based parties for establishing new pole factory for ready made supply for which Board had empowered M (A), E. D. (F) and C. E. (M) vide rsolution No. 10736, dated 3.7.1998.

(f) To invite the tenders by advertising in newspaper, to establish new pole factories in Bhavnagar, Jamnagar, Porbandar, Rajkot, Surendranagar, Palanpur destinations.

It was also the case of the deponent that poles were purchased from Bhanjibhai Bhadrsha at the rate of Rs. 1000/- per pole plus taxes and in the contract impugned in the present petition, it was decided to purchase poles at the rate of Rs. 909/ 950 per pole which had saved Rs. 87 lacs per year of the Board.

Regarding non-calling of petitioner No.2 for negotiations, it was stated that petitioner No.2 approached very late and that too with incomplete offer. He also did not remain present on 10th November, 1998, though called. It was, however, stated that the Board had considered all 13 applications received for supply of readymade PSC poles who had been requesting since June, 1998 (i.e. cyclone day), including the application of petitioner No.2. The respondent Board had finalised the applications based on negotiations held on 10th November, 1998 and placed the orders for eight locations at the rate of Rs. 909/- and Rs. 950/- per pole plus taxes.

It was then stated that Bhanjibhai Bhadresha who is the President of Saurashtra Kutch Pole Industries Association has been trying to corner the Board so as to compel the Board to purchase all poles from him only as he has been owner/ partner in a number of pole factories as he has been participating in new tenders in different names, details of which have been placed on record vide Annexure II to the affidavit in reply. Allegation is, therefore,

made that Bhanjibhai had adopted pressure tactics and was having oblique intention in using the platform of Association to force the respondents to place majority orders to him at his `choice rates'.

Regarding rates quoted in the tender forms invited on November 2, 1998 and opened on December 7, 1998, it was stated that lowest rate of Rs . 785/- was quoted by a factory in the State of Rajasthan. Obviously, it was of no use so far as need of the Board in Gujarat was concerned. The rate quoted by M/s Pratik Industries (Gujarat) of Rs. 896/- pluys taxes was only for Palanpur area and not for Saurashtra area. Most of the rates quoted by the factories established in Saurashtra region were more than Rs 949/- per pole. Even Bhanjibhai had quoted rate of Rs. 981/- per pole plus taxes. Decision was,therefore, taken on consideration of relevant and material facts to purchase poles at the rate of Rs. 909/- and 950/- which cannot be said to be illegal, unlawful or unreasonable. It was contended that the readiness and willingness for Rs/ 896/- per pole was shown by the petitonesrs only in the petition.

It was also stated that Chairman of respondent Board discussed all the issues raised by the petitioner Association during the meetings dated 12th April and 14th April, 1999 even though the petitioner Association is not recognised by the Board. It was stated that a decision was taken as per the practice of Board and even Bhanjibhai got such type of orders without inviting tenders since more than 10 to 15 years. Details of inviting tenders and occasions where such contracts were given are placed on record vide Annexure I. It was denied that no transparent procedure was adopted by the Board and contract was given to respondents Nos.3 to 7 in clandestine or surreptitious manner. It was asserted by the Board that the action was taken in larger public interest and in bona fide exercise of power.

The petitioners filed rejoinder to the affidavit in reply controverting the averments made and allegations levelled against Bhanjibhai Bhadresha and also contesting the points raised by the Board. It was stated that though some of the respondents had not even established factories and hence, were not in a position to supply poles, work order was issued in their favour only with a view to benefit them.

In further affidavit by the Board, it has reiterated its stand that in larger public interest, the decision was taken. Even in past, such decisions were taken and the

petitioners and other suppliers of poles had taken benefit of such private contract. They had,therefore, no right to make grievance against the impugned action of the Board.

Affidavits were also filed by contesting respondents to whom contracts have been given by entering into negotiations without inviting tenders. They have also stated that the members of the petitioner Association in general and Bhanjibhai Bhadresha in particular were beneficiaries of such policy of the Board. Looking to the record, it appears that at several occasions, contract was given without inviting tenders and to some 10, 15 or even 20 times. Of course, the contention of Mr. Vakharia is that the contracts were merely repeated from time to time . But the initial entry was by inviting public tenders. As in the instant case, it was not done, the award of contract to respondent Nos.3 to 7 was clearly illegal.

Reply of Mr. Pandya on behalf of the Board was that in the light of extraordinary situation and urgent need and necessity of poles in Saurashtra and Kutch, in consultation with officers of the Board at the highest level, a decision was taken to purchase PSC poles by inviting applications and negotiating with them. A resolution to that effect was also passed, all applicants were invited for negotiations and when all the persons were treated similarly, the petitioners cannot make grievance against such action.

Learned counsel for the parties argued at considerable length on the power and jurisdiction of this Court under Article 226 of the Constitution. Several judgments were also cited. Some of them were as under :

(1) Ramana vs. I.A. Authority of India, AIR 1979 SC 1628;
(2) Tata Cellular vs. Union of India, AIR 1996 SC 11;
(3) Sterling Computers Ltd. vs. M/s M. & N Publications Ltd, AIR 1996 SC 51;
(4) Raunaq International Ltd. vs.IVR Construction Ltd. AIR 1999 SC 393;
(5) Shri Sachinanand Pandey vs. State of W.B. AIR 1987 SC 1109;

I do not intend to burden this judgment by discussing them in detail. In my opinion, it is well settled that powers of this Court under Article 226 are limited particularly in the matter of giving of contracts by an instrumentality or agency of the State. In the case on

hand, in my view, certain relevant facts must be borne in mind, viz. (i) that essentially, the questions raised in the petition are in the realm of contract. True it is, that contract ius between an individual and instrumentality of State. Nonetheless, it is a contractual matter which has been made subject matter of petition; (ii) There is no statutory requirement of inviting tenders. Attention of the Court was not invited to any provision of law which enjoins the Board to invite tenders and to give contract to persons participating in that process only; (iii) Litigation is not public interest litigation and petitioner No.1 which is unrecognised Association is rival competitor and other petitioners are also traders who are interested in getting contract for supply of PSC poles to the Board; (iv) Petitioners have also supplied such poles to the Board in past . Some of the members of petitioner No.1 Association are even today supplying PSC poles to the Board and they had also made applications in the light of present requirement of the Board; (v) According to the Board, requirement of PSC poles was on large scale. It was also urgent and extraordinary because of (a) regular need; (b) Tatkal scheme and (c) cyclone in Saurashtra and Kutch area in June, 1998; (vi) the Board considered the matter through its members at the highest level and a decision was taken to consider the applications on hand by calling all of them for negotiation and decide those applications instead of insisting on tenders; (vii) There were 13 applications and all the applicants were invited for discussion and negotiation and the decision was taken; (viii) On scrutiny of all the applications and the rates quoted therein, the Board was of the opinion that the figures of Rs. 909/- and 950/- per pole were proper; (ix) Even the petitioners have quoted figures from Rs. 949 to 1000 per pole; and (x) Even in past, at several occasions, such contracts were given to various persons without inviting tenders.

Now, this Court exercises power of judicial review under Article 226 of the Constitution. It has no appellate jurisdiction and cannot substitute its judgment for judgment of the Board. Obviously, therefore, the matters which are to be considered by the Board must be left to the officers, members and experts of the Board who were in the committee and when a decision has been taken by the Committee, the court would normally not interfere with it . No doubt, if such decision is contrary to law, arbitrary, unreasonable or otherwise vulnerable, it is the power and duty of the Court to set it aside. In the facts and circumstances of the case, however, in my opinion, it cannot be said that the Board has exceeded

its power in giving contract by private negotiations to respondent Nos.3 to 7 or the decision is such that no reasonable man, in the like situation would not reach such a decision. From the affidavit in reply, it is clear that in past, in numerous cases, contracts were given to persons without inviting tenders and members of the petitioner Association themselves were beneficiaries of such contracts. It is alleged not only by the contesting respondents but also by the Board that President of the Petitioner Association Bhanjibhai wanted to corner all contracts and he has made the Association as a platform to achieve that goal. But even if such allegations are ignored, the fact remains that such private contracts were given by the Board in the past and members of the petitioner Association had taken benefits of such contracts. It, therefore, does not lie in the mouth of the petitioners to contend that no such contract could have been given without inviting tenders or by private negotiations.

Mr. Vakharia, no doubt, attempted to distinguish the present contract with contracts in past by urging that initial entry of all the members of the petitioner Association was through public tender. According to him, once a person has entered by a legally permitted mode and method, he can be awarded contract in future without inviting tenders. In my opinion, the question is not of initial entry or award of contract at a subsequent stage. The question is of power , authority or legality of the action. If it is not open to the Board to give contract otherwise than by inviting tenders, the action must be held to be bad. If, on the other hand, it is not the requirement of law, it cannot be set aside merely on the ground that contract ought not to have been given without inviting tenders. The Court, in the light of the materials on record and considering the facts and attending circumstances should decide whether the action is arbitrary, unreasonable or mala fide. On the other hand, if such action is otherwise legal and has been taken by the authority in bona fide exercise of power, the Court does not embark upon it by entering into correctness or otherwise thereof or of the wisdom of the authority behind such action. In the instant case, in the affidavit in reply filed by the Chief Engineer (Materials) , it has been asserted that due to extraordinary circumstances , such action was required to be taken and was taken after considering the matter at all levels. Such an action ,therefore , cannot be said to be bad in law.

It is well settled that ambit and scope of judicial

review in this field is extremely limited. A court of law is not expected to opine on a matter of policy. What is open to challenge is not the correctness of the decision itself but the process by which such a decision has been arrived at by the authority. In the light of the facts and circumstances, if the Board decided to consider applications received by it by entering into negotiations with the applicants, and by exercising the said process, contract has been given to respondent Nos. 3 to 7, in my opinion, it cannot be said that the act is unlawful, arbitrary or unreasonable that no reasonable man could have taken such decision. Obviously, this court cannot sit in appeal over the decision of the Board. Therefore, even if two views are possible,viz. that contract might have been awarded by inviting tenders or by considering applications on hand, the second alternative adopted by the Board cannot be said to be unlawful, illegal or contrary to law and set aside by this Court under Article 226 of the Constitution on the ground that former would have served public purpose better. In my opinion, as there is no infirmity in the decision of the respondent Board, the petition deserves to be dismissed.

At this stage, one more point deserves to be noted. Respondents No. 3 to 7 have, in their affidavits in reply as well as in separate Civil Applications, raised several contentions. It was their case that in the process of cornering all contracts, Bhanjibhai Bhadresha, President of the petitioner Association, has filed the present petition and obtained interim relief. It was also alleged that said Bhanjibhai has no objection in purchasing poles by the respondent Board by entering into private contracts. In fact, he is the person who has taken maximum benefit of award of such private contracts. The grievance of Bhanjibhai is that such contract ought to have been given to him or to his associates only and not to others. No person unconnected with Bhanjibhai and members of Association can be awarded any contract and with that object in mind, the present litigation has been filed in this Court. They have also highlighted in their respective pleadings how serious prejudice has been caused to them after the contract was entered into by the Board with them, how they have acted to their detriment, how huge amount was spent by way of investment and because of ad-interim relief, how they have suffered. They have further stated that in view of ad-interim relief granted by this Court, on the one hand, respondent Nos.3 to 7 have suffered and on the other hand, loss has been caused to the Board as it had to pay much more amount in purchasing poles than the amount for which

contract was awarded (Rs. 909/- and 950/- per pole) to respondent Nos.3 to 7. The matter did not end there. It is Bhanjibhai and his associates who have obtained undue benefits of the interim order as the Board was compelled to purchase poles from them. In this connection, they relied on interim relief in SCA No. 1924 of 1999 which is extracted in the earlier part of the judgment. They, therefore, submitted that this is eminently a fit case to issue appropriate directions to the petitioners to pay damages/ compensation to the Board as well as to the contesting respondents. In this connection, several decisions of the Supreme Court were also cited.

Mr. Vakharia, however, submitted that the Association felt that the matter was of great importance and it has,therefore, approached this Court. Ad-interim relief was granted by the Court and was continued from time to time in spite of objection by the Board and contesting respondents. He stated that in Civil Applications filed by the contesting respondents, a prayer was for vacating of interim relief and not for payment of compensation/ damages. He,therefore, submitted that the respondents are not entitled to damages/ compensation .

In the facts and circumstances , in my opinion, ends of justiuce would be met if the petition is ordered to be dismissed and ad-interim relief is vacated without making any order as to payment of damages/ compensation. But in the light of pleadings of the parties as also the affidavits in reply and Civil Applications, it would be appropriate if petition is ordered to be dismissed with costs by directing the petitioners to pay costs to the respondents.

For the foregoing reasons, in my opinion, no case has been made out by the petitioners to interfere with the decision taken by the respondent Board to award contract for supply of PSC poles to respondens Nos. 3 to 7. Since the decision cannot be said to be unlawful, arbitrary or otherwise unreasonable. the petition deserves to be dismissed and is accordingly dismissed. The prayer of the contesting respondents to direct the petitioners to pay damages/ compensation as they have suffered because of ad-interim relief obtained by them from this Court is not granted. It is,however, directed that the petitioners will pay cost to each of the respondents which is quantified at Rs. 10,000/-. But it is clarified that petitioners will pay Rs 10,000/- in all to respondent No. 1 and 2 and Rs. 10,000/- to each of respondent Nos. 3 to 7. Such amount will be paid within a period of one month from today. Ad-interim relief

granted earlier stands vacated. no orders on Civil Applications in view of the order passed in this petition. The petition accordingly stands disposed of.

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Learned counsel for the petitioners prays that ad-interim relief granted earlier may be continued for some time so as to enable the petitioners to approach higher forum.

M/s Pandya, Champaneri and Ravani for the contesting respondents submitted that a finding has been recorded by this Court that no case has been made out by the petitioners and serious prejudice will be caused to the respondents if interim relief is continued further. It was also submitted that if ad-interim relief is ordered to be extended, appropriate conditions may be imposed on the petitioners.

In view of the fact, however, that ad-interim relief was granted as early as on 4th June, 1999 and it has been continued till today, in my opinion, it is appropriate to continue for reasonable time. Hence, ad-interim relief is ordered to continue upto 10th May, 2000 without any condition.

(C.K.Thakker, J.)